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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

27 IRMA RODRIGUEZ,

28 Plaintiff,

v.

YOUR FIRST CHOICE, LLC D/B/A
FIRST CHOICE PAYDAY LOAN,

Defendant.

Case No.: 2:16-cv-02447-APG-CWH

PLAINTIFF'S TRIAL BRIEF

27 **I. STATEMENT OF THE CASE**

28 In this case against Your First Choice, LLC d/b/a First Choice Payday Loan ("Defendant")
for violations of Nevada's Payday Lender Law, NRS 604A.415, and the Fair Credit Reporting Act

1 (“FCRA”), 15 U.S.C. § 1681, et seq. NRS 604A.415 incorporates the Federal Fair Debt Collection
2 Practices Act (“FDCPA”), 15 U.S.C. §§ 1692a to 1692j.¹ In this regard, this action is informed by
3 the FDCPA §§ 1692c (communication in connection with debt collection), 1692d (harassment),
4 1692e (false or misleading representations), and 1692f (unfair practices). The FCRA’s provision
5 limiting the permissible purposes for a credit pull, 15 U.S.C. § 1681b(a), (f), are also at issue
6 because several months after this litigation commenced, Defendant pulled Plaintiff’s consumer
7 report from Transunion, but at that point had no account relationship sufficient to satisfy any
8 permissible purpose under section 1681b.

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10 On October 25, 2017, this Court denied Defendant’s Motion for Summary Judgment.²
11 Trial is set currently for the April 23, 2018 trial stack before this Court.

12 **II. STATEMENT OF FACTS**

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14 In November 2015, Plaintiff incurred a pay day loan (the “Debt”) to Defendant. The Debt
15 was a “high-interest loan” as defined by NRS 604A.0703 (defining high interest loan as one which
16 charges an annual percentage rate of more than 40 percent)³; the interest rate on the Debt was over
17 166 percent.⁴ Pursuant to stipulation between the parties, the following facts are not in dispute:
18 (1) Defendant is a “licensee” within the meaning of NRS 604A.075; (2) Defendant is a “debt
19 collector” under the FDCPA; (3) Defendant, through its management, authorized the doing and
20 the manner of the acts alleged in this action; and (4) Ms. Rodriguez defaulted on the Debt when
21 she lost her employment.

22 Thereafter, FIRST CHOICE engaged in a series of debt collection practices through a
23 series of collection calls and unannounced “field visits” to Ms. Rodriguez’s home. Ms. Rodriguez
24 is a single mother of a four-year-old, both of whom were terrified by Defendant’s visits to her

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27 ¹ NRS 604A.415(1).

28 ² ECF No. 31.

³ NRS 604A.0703.

⁴ See YOUR CREDIT Promissory Note, **ECF No. 22**, at 37.

1 home. Ms. Rodriguez pleaded with Defendant several times over the phone to stop its abusive
 2 collection conduct, and give her a chance to get back on her feet so that she could make payments
 3 on the Debt.

4 On January 18, 2017, Defendant pulled Plaintiff's consumer report from Transunion,
 5 ostensibly because it "lost contact" with Ms. Rodriguez. Plaintiff withdrew any consent to
 6 Defendant's credit pulls when she filed the instant action. On January 18, 2017, both parties were
 7 represented by counsel, discovery in this action had commenced, and "contact" with Ms.
 8 Rodriguez was readily available, though subject to this Court's orders.

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10 **III. ISSUES TO BE RESOLVED AT TRIAL**

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12 **A. Whether Defendant acted unprofessionally, unfairly, or in an unlawful manner**
when it continued calling Ms. Rodriguez repeatedly, and made unannounced
"field visits" to her home late in the evening, thus violating Nevada's Payday
Lender Law.

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14 NRS 604A.415 provides that following default of a payday loan, a licensee under Ch. 604A
 15 may collect the debt, but must do so in a professional, fair and lawful manner, while also
 16 conducting itself in accordance with, among other things, the FDCPA's prohibitions. The FDCPA
 17 measures a debt collector's behavior according to an objective "least sophisticated debtor"⁵
 18 standard to ensure that all consumers are protected.⁶ As a licensee under NRS 604A, Defendant
 19 was required to comply with the FDCPA or be held strictly liable for violating it.⁷ In this regard,
 20 the issues presented at trial are as follows:

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22 Section 1692c(a) of the FDCPA prohibits any communication at any unusual time or place
 23 that the licensee knows or should know to be inconvenient to the consumer. The evidence will
 24 show that on several occasions, Defendant sent a collector to the Plaintiff's home late in the

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27 ⁵ *Trull v. GC Servs. Ltd. P'ship*, 961 F. Supp. 1199 (N.D. Ill. 1997) (level of sophistication of
 consumer irrelevant when determining whether unlawful harassment occurred).

28 ⁶ See *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011).

⁷ See e.g., *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 997 (9th Cir. 2012).

1 evening, where she and her four-year-old child reside. Each time the collector arrived, Ms.
2 Rodriguez felt intimidated and harassed, and told the Defendant as much, demanding that
3 Defendant not make further field visits. At minimum, this was sufficient to put Defendant on
4 notice that the field visits were at an unusual time and place. Further, the evidence will show that
5 Plaintiff *never* consented to field visits, and the agreement between the parties omits any reference
6 to them. When Defendant continued its unwanted and intimidating field visits, it did so in an
7 unprofessional and unfair manner, and did so in an unlawful manner because it ran contrary to the
8 FDCPA's protection under subsection 1692c(a)(1).

9 Section 1692d generally protects consumers from harassing or abusive debt collection
10 practices. At issue in this case are subsections 1692d(5)-(6). Subsection 1692d(5) prohibits a
11 licensee from making telephone calls repeatedly with intent to annoy, abuse or harass a consumer.
12 Subsection 1692d(6) prohibits a licensee from disclosing its identity to the consumer when making
13 collection calls. The evidence will show that Defendant failed in both respects when it knowingly
14 made repeated calls to Plaintiff even after she informed Defendant that she lost her job, had no
15 present ability repay at the current payment level, and even offered lower payments until she was
16 back on her feet and able to resume her full repayment obligation. The evidence will also show
17 that Defendant knew Ms. Rodriguez spoke little English and that Spanish was her primary
18 language. Nevertheless, it repeatedly sent an agent on field visits who didn't speak Spanish, and
19 was large and imposing, resulting in tremendous fear, frustration and confusion for Ms. Rodriguez.
20 The evidence will show that because Defendant continued calling Plaintiff incessantly thereafter,
21 it did so with the intent to harass Plaintiff. These failures were unprofessional and contrary to law.

22 Section 1692e generally prohibits licensees from making false or misleading
23 representations to a consumer in connection with debt collection. At issue in this case are
24 subsections 1692e(5) & (10). Subsection 1692e(5) prohibits licensees from threatening any illegal
25 action. Subsection 1692e(10) prohibits licensees from use of any false representation or deceptive
26 means to collect a debt. The evidence will show that Defendant violated these provisions when it
27 represented that it could keep communicating with her even after she instructed Your First Choice
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1 to cease any further calls or field visits until she was in a financial position to repay the debt.
 2 Accordingly, Defendant acted unprofessionally and unfairly when it misrepresented its right to
 3 continue making contact with Plaintiff, particularly in regard to its right to continue “field visits”
 4 to her home.

5 **B. Whether Defendant violated the FCRA when it pulled her Transunion consumer**
 6 **report three months after commencement of the instant action.**

7 Under the FCRA, a person may only pull a consumer report for another person under
 8 limited circumstances. Section 1681b(a) provides six exclusive permissible purposes, of which
 9 only paragraphs (2)-(3) are at issue in this action. Paragraph (2) allows a pull in accordance with
 10 the written instruction of the consumer to whom the report relates, while paragraph (3)(A) allows
 11 a pull in connection with a review or collection of an account of the consumer. Neither are
 12 applicable here, where litigation commenced well= before the pull at issue. As Judge Du reasoned
 13 recently:

14 The FCRA is clear that account review inquiries are permissible to determine
 15 whether the consumer *continues* to meet the terms of the
 16 account. 15 U.S.C. § 1681b(a)(3). The operative word in this provision is
 17 “continues,” which indicates Congress recognized that once an individual
 18 terminated her relationship with a lender it was no longer permissible for the
 lender to access the account—precisely because the lender would have no
 reason for doing so.⁸

19 Defendant will assert that it made the pull because it “lost contact” with Ms. Rodriguez;
 20 ostensibly the purpose was for debt collection. However, the evidence will show that in or about
 21 early November 2016, Defendant had noted internally that it was not to make contact with Ms.
 22 Rodriguez, and continued to note this fact through late December 2016. The idea that it “lost
 23 contact” with Ms. Rodriguez is also directly undercut by the fact that Defendant was represented

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 27 ⁸ *In re Ocwen Loan Servicing LLC Litig.*, No. 3:16-cv-00200-MMD-WGC, 2017 WL 1289826,
 28 at *5 (D. Nev. Mar. 3, 2017).

1 by counsel who on January 4, 2017, contacted Plaintiff's counsel notifying Plaintiff of his
 2 representation, and on February 6, 2017 served Ms. Rodriguez with twenty interrogatories, twenty-
 3 five requests for admission, and twenty-five requests for production. In other words, the evidence
 4 will show that Defendant had no permissible purpose under the ruse of "lost contact."

5 **IV. RELIEF REQUESTED**

6 **A. Actual damages for emotional distress.**

7 In *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, the Ninth Circuit sustained the
 8 jury award of actual damages, noting that at the close of the evidence, the trial judge issued the
 9 following jury instructions with respect to damages available under the FDCPA:

10 Actual damages include damages for personal humiliation, embarrassment, mental
 11 anguish and emotional distress. There is no fixed standard or measure in the case of
 12 intangible items such as humiliation, embarrassment, mental anguish or emotional
 13 distress. Mental and emotional suffering and distress pass under various names such
 14 as mental anguish, nervous shock and the like. It includes all highly unpleasant
 15 mental reactions such as fright or grief, shame, humiliation, embarrassment, anger,
 16 chagrin, disappointment, worry and nausea. The law does not set a definite standard
 17 by which to calculate compensation for mental and emotional suffering and distress.
 18 Neither is there any requirement that any witness express an opinion about the
 19 amount of compensation that is appropriate for the kind of law.

20 The law does require, however, that when making an award for mental and
 21 emotional suffering and distress you should exercise calm and reasonable judgment.
 22 The compensation must be just and reasonable.⁹

23 Here, the Nevada Payday Lender Law authorizes actual damages for violations of its
 24 provisions,¹⁰ and although this provision is without meaningful caselaw interpreting its scope, the
 25 FDCPA is an appropriate analogue by which to measure appropriate actual damages. Similarly,
 26 the FCRA authorizes actual damages.¹¹ Under the FCRA, 'actual damages' includes recovery for
 27 emotional distress and humiliation."¹²

28 ⁹ 637 F.3d 939, 957 (9th Cir. 2011).

¹⁰ NRS 604A.930(a).

¹¹ 15 U.S.C. § 1681o.

¹² *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995).

1 Here, the evidence will show that Ms. Rodriguez suffered emotional distress when
 2 Defendant invaded her privacy both and intentionally intimidated and harassed her repeatedly
 3 through its campaign of calls, field visits, and credit pull. Ms. Rodriguez is entitled to actual
 4 damages for emotional distress suffered as a result of Defendant's conduct.¹³

5 **B. Punitive Damages**

6 Nevada's Payday Lender Act also provides for punitive damages.¹⁴ In order to recover
 7 punitive damages, a plaintiff must show the defendant acted with oppression, fraud or
 8 malice.¹⁵ Oppression is a conscious disregard for the rights of others constituting cruel and unjust
 9 hardship.¹⁶ "Conscious disregard" is defined as "the knowledge of the probable harmful
 10 consequences of a wrongful act and a willful and deliberate failure to act to avoid those
 11 consequences."¹⁷ Malice is conduct which is intended to injure a person or despicable conduct
 12 which is engaged in with a conscious disregard of the rights and safety of others.¹⁸ In order to
 13 establish that a defendant's conduct constitutes conscious disregard, the conduct must at a
 14 minimum "exceed mere recklessness or gross negligence."¹⁹

15 Similarly, the FCRA authorizes punitive damages for "willful" violations of its provisions.
 16 A "willful" violation under the FCRA includes "not only knowing violations of a standard, but
 17 reckless ones as well."²⁰ A defendant acts in reckless disregard if the defendant's action "is not
 18 only a violation under a reasonable reading of the statute's terms, but shows that the company ran
 19 a risk of violating the law substantially greater than the risk associated with a reading that was
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 23 ¹³ *McCollough*, 637 F.3d at 957 (9th Cir. 2011).

24 ¹⁴ NRS 604A.930(b).

25 ¹⁵ *Shaw v. CitiMortgage, Inc.*, 201 F. Supp. 3d 1222, 1263 (D. Nev. 2016), *appeal dismissed*, No.
 26 16-16542, 2017 WL 3923364 (9th Cir. Mar. 20, 2017) (citing *Pioneer Chlor Alkali Co. v. National
 27 Union Fire Ins. Co.*, 863 F.Supp. 1237, 1250 (D.Nev.1994)).

28 ¹⁶ *Id.* (citing *Ainsworth v. Combined Ins. Co. of America*, 104 Nev. 587, 763 P.2d 673, 675 (1988)).

29 ¹⁷ NRS 42.001(1).

30 ¹⁸ See NRS 42.005(1).

31 ¹⁹ *Shaw*, 201 F.Supp. 3d at 1263 (quoting *Pioneer Chlor Alkali Co.*, 863 F.Supp. at 1251).

32 ²⁰ *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007).

merely careless.”²¹ That is, the defendant must have taken action involving “an unjustifiably high risk of harm that is either known or so obvious that it should be known.”²²

Here, the evidence will show that Defendant engaged in oppressive and malicious behavior. Ms. Rodriguez suffered emotional distress when Defendant invaded her privacy and intentionally intimidated and harassed her repeatedly through its campaign of calls, field visits. The evidence will also show that Defendant ran a risk substantially greater than a merely careless understanding of its permissible purpose for pulling Ms. Rodriguez’s consumer report. Ms. Rodriguez accordingly seeks punitive damages.

C. Costs, expenses of litigation, and reasonable attorney’s fees pursuant to NRS 604A.930(1)(c), 15 U.S.C. §§ 1681n, and 1681o.

Given the structure of these sections, attorney’s fees should not be construed as a special or discretionary remedy; rather each provision mandates an award of attorney’s fees as a means of fulfilling the Nevada Legislature and Congress’s intent that the Acts should be enforced privately. Plaintiff anticipates submitting an appropriate bill for fees and costs following trial.

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²¹ *Id.* at 69.

²² *Id.* at 68 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)).

1 Dated: April 17, 2018

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 17, 2018, a true and correct copy of the foregoing
3 PLAINTIFF'S TRIAL BRIEF was served on counsel of record by emailing a copy of the
4 aforementioned by CM/ECF Notification:

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8 ATTORNEY FOR DEFENDANT
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10
11 _____
12 /s/ Matthew I. Knepper
13 An employee of Knepper & Clark, LLC

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